Backgrounder

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Center for Immigration Studies

America's Other Border Patrol

The State Department's Consular Corps and Its Role in U.S. immigration

By Nikolai Wenzel

The debate over immigration reform often centers on the Immigration and Naturalization Service (INS) and its Border Patrol; however, little is heard about the U.S. State Department and its consular corps. It may thus come as a surprise that the consular corps is really America's first line of immigration enforcement, making the decision to issue or deny visas to millions of applicants each year. In fact, the consular corps plays such an important role in immigration that no meaningful discussion of immigration reform is possible without a close examination of the activities of this governmental body.

What follows is based on observations made during my tour as a Foreign Service Officer at the U.S. Embassy in Mexico City from 1997 to 1999, added to the observations and recollections of almost a dozen former colleagues who have served as consular officers. Although I served only one overseas tour before leaving the Foreign Service, I estimate that I processed somewhere between 30,000 and 50,000 visa applications during my two-year posting at the U.S. Embassy in Mexico City, which hosts one of the busiest non-immigrant visa operations in the world. I also worked on temporary duty at the U.S. Consulate in Ciudad Juarez, Mexico, one of the world's three busiest immigrant visa operations.

Consular officers have three principal areas of responsibility in the field of immigration law: non-immigrant visas (most commonly "tourist" visas), immigrant visas (the first step toward obtaining a "green card"), and anti-fraud activities related to the administration of visa issuances.[1] U.S. immigration laws and regulations can be found in the Immigration and Nationality Act of 1952 (INA), as amended by subsequent legislation.

Non-Immigrant Visas

Non-immigrant visas are the short-term, temporary-stay entry permits for which the State Department has primary responsibility. Non-immigrant visas fall into more than 20 categories, ranging from A visas for diplomats and B visas for business and tourism, through E visas for investors, H and L visas for temporary workers, to O and P visas for artistic performers, and R visas for temporary religious workers.

The B visa for business and tourism is the most common type of non-immigrant visa and is also the most relevant visa category for this discussion. The section of the law governing issuance of non-immigrant visas is Section 214(b) of the INA, which states that, unless seeking entry under certain work visas, "every alien … shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officer at the time of application for admission, that he is entitled to nonimmigrant status.…." In other

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words, all tourist visa applicants, and thus a majority of non-immigrant visa applicants, are ineligible to receive visas until they can prove otherwise. This premise of ineligibility is the exact opposite of the presumption of innocence in the U.S. legal system and is a critical point to make in examining the scope of State Department responsibility in administering U.S. immigration law. A consular officer must ascertain a visa applicant's ties to his country of origin and determine the likelihood that the applicant will not overstay his visa. In order to make this determination, a consular officer relies on the applicant's answers to a few cursory questions during a brief interview, knowledge of the economic and social conditions in the applicant's country, the applicant's supporting documents—and intuition.

The interviewing officer will issue the visa if he is convinced that the applicant's ties to his home country necessitate his return (and if the applicant passes a computerized background check). Otherwise, the officer will deny the visa.

The INS official at the U.S. port of entry makes the final decision and may deny entry if he believes that the visa holder is an intending immigrant. However, INS inspectors will consider the visa as *prima facie* evidence of eligibility and will typically grant entry. Thus, the visa serves as an informal mode of communication between State Department consular officers in the country of origin and INS inspectors at the port of entry.[2]

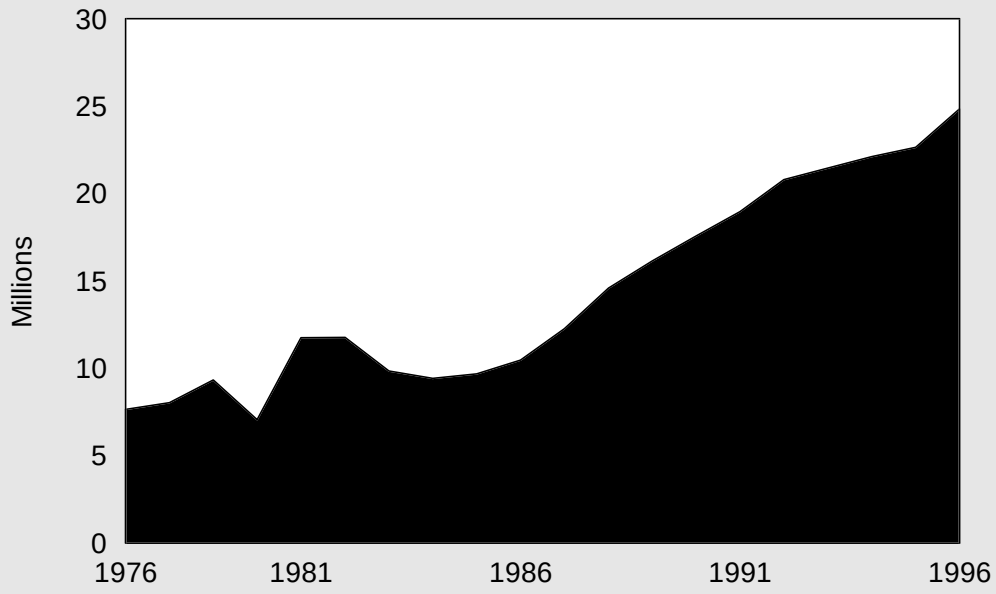
Immigrant Visas

Consular officers are also responsible for interviewing applicants for immigrant visas, which are the first step toward obtaining permanent U.S. residency, or a "green card." As with non-immigrant visas, the law provides for different types of immigrant visas, from family-based and employment-based visas to so-called "diversity" visas, issued by lottery to citizens of many countries. Although INS prepares and approves the initial paperwork in the United States, most applicants must complete an interview at the U.S. consulate in their country of origin. As with non-immigrant visas, the consular officer plays a crucial role in determining who will obtain permanent U.S. residency.

During an immigrant visa interview, the consular officer verifies that relevant forms are completed and signed. The consular officer also verifies the applicant's claim to immigrant status and, through a background check, verifies that the applicant has no legal ineligibilities.

For family-based visas, which constitute the majority of immigrant visas, the most noteworthy issue is verification of the affidavit of support: Each applicant is sponsored by one or more family members (and, in some cases, a joint sponsor), who pledge to support the immigrant financially for an initial period. If the sponsor's income falls below established poverty guidelines, the visa may be refused, if only temporarily, under Section

Figure 1. Non-Immigrants Admitted, FY 1975-96



Source: U.S. Immigration and Naturalization Service, Statistical Yearbook of the Immigration and Naturalization Service, 1997.

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212(a)(4) of the INA. This section states that, "Any alien, who in the opinion of the consular officer at the time of application for a visa … is likely at any time to become a public charge is excludable."

Fraud

As one might expect, applicants throughout the world may use fraudulent means to obtain visas. Compared to the cost and danger involved in using the services of a professional alien smuggler for an illegal border crossing, it is easier and safer for an intending immigrant to pay a $45 visa interview fee and mislead a consular officer who has received training in cultural sensitivity and interview courtesy. The prevalence of fraud varies from country to country and from consulate to consulate. At U.S. consulates overseas, anti-fraud units range from units staffed by several officials, including a mid-level American officer supervising a team of local investigators, to nominal units consisting of a single junior officer who also shoulders the full-time responsibility of conducting regular daily visa interviews.

Non-immigrant visa fraud typically consists of fake documents or information regarding prior visa applications or stated purpose of visits to the United States. Fraudulent immigrant visa applications mostly involve fake relationships, but can also involve fake supporting documentation.

An anti-fraud unit fulfills several functions. Investigators screen paperwork before applicants are interviewed. They also conduct interviews of applicants suspected of fraud and mount major fraud investigations. The anti-fraud unit can also act as a liaison with local governments on wider-ranging fraud cases, such as alien-smuggling rings.

State Department Priorities: At Odds with Immigration Law

A startling statistic on U.S. immigration indicates that the State Department must do a better job of determining who is eligible to receive a non-immigrant visa. According to testimony last year by a senior INS official before the House immigration subcommittee, aliens who enter legally but overstay their visas constitute 40 to 50 percent of the estimated illegal alien population in the United States.[3] In other words, almost half of the estimated six million illegal residents now in the United States entered the country on (putatively) non-immigrant visas issued at U.S. consulates abroad.

Given the institutional and bureaucratic traits of the Foreign Service, this statistic is not surprising. Entrusting the administration of laws to officials with diplomatic priorities is a recipe for trouble. In fact, it is difficult to imagine two governmental functions that are more incompatible than diplomacy and thorough administration of the law. Diplomacy entails dialogue, cooperation, compromise, and conciliation between nations—all within a context of mutual esteem. Conscientious administration of the law, on the other hand, entails adherence to the rule of law and intolerance of criminal behavior. This disconnect was epitomized in a recent article on the State Department's so-called consular "best practices," a series of guidelines that purports to improve consular operations worldwide. While the article is not official State Department policy *per se*, it appeared in the Department's *State* magazine and was written by the former "best practices" coordinator in the Bureau of Consular Affairs:

It is difficult to imagine two governmental functions that are more incompatible than diplomacy and thorough administration of the law.

> *The "best practices" initiatives undertaken by the Bureau of Consular Affairs are improving consular operations on a daily basis.*
>
> *Through fundamental management changes, consular managers can now meet their customers' expectations and make the most of available resources – while projecting a positive image of the Department worldwide…*
>
> *…training programs that focus on listening skills, effective communication and time management have improved the quality of service the staff provides. The techniques help to defuse tensions and reduce stress while providing better customer service…*
>
> *These are but a few of the "best practices" that consular managers have initiated to achieve the balance between better service to the public and an improved work environment.*[4]

Surely public diplomacy and efficiency are important, but what happened to the administration of the law? While the tensions between customer service and adherence to the law may not be mutually exclusive, there do exist strong tradeoffs, and it is impossible to comply

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fully with both priorities. The State Department has chosen public diplomacy to the detriment of conscientious administration of the law.

As a consular officer in Mexico, I came to understand not only the State Department priority on bilateral relations, but also its consequences for the administration of immigration law. In Mexico City, for example, the refusal rate for non-immigrant visa applicants hovered at approximately 30 percent. I understand it was much lower at the other consulates within Mexico. Given that more than half of the illegal aliens in the United States are Mexican,[5] the visa refusal rate at Mexican posts should likely have been much higher. Nevertheless, the State Department's priority on maintaining positive bilateral relations diminishes its ability to enforce immigration law. *The Wall Street Journal* recently reported that the governments of Mexico and the United States "tacitly acknowledge that the laser visa [a new, "biometric" B visa] program has become a de-facto guest-worker program because many Mexicans use the day passes, intended for shopping or short family visits, for job searches." The situation is unlikely to change, due to political pressure on both sides of the border for greater visa issuances.[6] Worldwide, State Department procedures call for supervisory review of refusals, but not issuances—thus, relatively inexperienced junior officers are trusted to issue visas but are second-guessed on refusals. This management practice is ironic given the presumption in U.S. immigration law that an applicant is ineligible to receive a visa until he proves otherwise.

In adjudicating applications for immigrant visas, the State Department only timidly enforces the affidavit of support requirements. Official publications state that "INS and DOS [the State Department] will not use a set formula to determine whether a person qualifies as a sponsor."[7] However, if the interviewing consular officer suspects that the immigrant visa applicant may one day seek public benefits, the law instructs the officer to refuse the applicant. As explained above, the law prohibits issuance of a visa to an alien likely, in the opinion of the interviewing officer, to become a public charge. In practice, consular officers routinely misapply this provision and issue visas to applicants whose sponsors are already living well below the poverty line, before the added burden of newcomers. Given the increasing level of poverty among immigrants in the United States, the State Department's role in effectively screening legal immigrants for financial solvency is also suspect. A recent Center for Immigration Studies Paper, "Importing Poverty: Immigration's Impact on the Size and Growth of the Poor Population in the United States,"[8] indicates that "immigrants are a large and growing factor in the stubborn level of poverty seen in the United States over the past two decades because newcomers to the country are more likely to be poor and to remain so longer than in the past…. Each successive wave of immigrants is doing worse and worse. Each wave of immigrants has a higher poverty rate, and a much larger share of their children will grow up in poverty."[9] Congress must have foreseen the possibility of immigrants taxing the country's public resources when it passed Section 212(a)(4) and the affidavit of support requirements. Unfortunately, the State Department does not conscientiously apply those laws.

Staffing and Numbers: Quantity Trumps Quality

State Department Foreign Service Officers select one of five career specializations: administrative, consular, economic, political, or public affairs. However, due to a chronic shortage of consular personnel and the ever growing visa workload, all junior officers are required to spend 12 months (and often longer) in a consular position that usually entails adjudicating visa applications. Like hazing in college fraternities, these early tours are considered an unpleasant rite of passage during which foreign policy enthusiasts perform work that is not directly relevant to their professional aspirations. Many junior officers with no interest in consular work withdraw mentally from the drudgery of visa duties. For these officers, consular tours become a sort of professional "out-of-body" experience or temporary state through which they pass before beginning the diplomatic work for which they joined the Foreign Service. Added to these junior officers are State Department employees from Washington on so-called "excursion" tours, and the spouses of Foreign Service Officers who are hired to fill the many vacant interviewing positions at visa offices worldwide. Although some of these non-traditional recruits perform as well as standard consular officers, this staffing practice reflects the State Department priority of putting live bodies behind interview windows over the conscientious administration of U.S. immigration law.

Given the workload, one cannot blame visa officers for turning inward: demand for non-immigrant visas is high and inelastic at most consulates throughout the world. The result of high visa demand could be the eyesore of long lines of applicants outside many U.S. diplomatic missions; but due to the diplomatic priority of maintaining good public relations, there is pressure on the consulate to reduce the lines. Supervisors are pressured into accepting unsustainable numbers of daily interviews, and visa officers are pressured to move the applicants

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through the line as quickly as possible. In the end, the screening process required by the law is subverted to the exigency of public relations. In addition, the Bureau of Consular Affairs collects revenue from application fees in direct proportion to the number of interviews it conducts. Like an unscrupulous broker paid on commission, the bureau reacts to incentives by placing the number of transactions above quality.

In Mexico City, for example, the unrealistically high numbers of daily interviews meant that each officer usually interviewed 150-200 applicants over a span of five to seven hours. This led to an average of about two minutes per application, during which a consular officer had to review documents, ask questions in Spanish, determine whether the applicant qualified for a non-immigrant visa, and fill out the requisite paperwork. The difficulty of the situation was compounded by many factors, such as limited interviewing officer Spanish abilities, frequent illiteracy on the part of the applicants, and low quality audio systems making it difficult for applicant and interviewer to hear each other through bulletproof glass. In most instances, the interview was over by the time the applicant understood what was being asked of him, and the officer made a hasty decision based on intuition and a cursory review of the situation.

The high interview numbers also meant that a consular officer heard the same stories repeated 100 to 200 times each day, 500-1,000 times each week, and 2,000 to 4,000 times each month, for a total of 12 months over a two-year tour. The desensitizing monotony brought on by the seemingly endless flood of applicants did not create an environment conducive to quality screening of applicants. This problem was exacerbated by a policy of judging visa officers on secondary factors such as number of interviews conducted each day (and, by implication, speediness of interviewing) and politeness to applicants, rather than on thoroughness of applicant screening or judicious application of immigration law. Of course, the high numbers also meant that a vast majority of the workday was spent on interviews, to the detriment of other important duties such as internal controls, record keeping, and anti-fraud work.

Fighting Fraud vs. Diplomacy

Perhaps the most obvious area in which the consular corps' priority on public relations affects immigration is in the field of anti-fraud investigations. For consular officers, fighting fraud is an inconvenience imposed on a diplomatic mission. The main section of immigration law that governs fraud is Section 212(a)(6)(C)(1), which states that, "an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure a visa, other documentation, or entry into the United States…is excludable." According to the letter of the law, such ineligibility resulting from an act of fraud results not in a temporary refusal, but in a life-long ban from entering the United States. Given this strong penalty, Congress must have intended for an act of fraud to constitute an offense serious enough to bar a second chance.

> Visa officers are pressured to move the applicants through the line as quickly as possible.

Any reasonable reading of the law indicates that an applicant has committed fraud if the false information presented to a U.S. official would have resulted in a visa issuance, had the information actually been true. However, in setting guidelines on fraud, the State Department has set a very high standard for determining materiality. According to official policy, an act of fraud is not material if the applicant would have been eligible for a visa had he not presented the false information—regardless of the fact that he attempted to defraud a consular officer. Under this interpretation, an applicant whose personal circumstances make him eligible for a visa but who makes a false claim before a consular officer is ineligible, not for life, but only temporarily. Another consular interpretation of immigration laws is the "timely retraction" doctrine, by which an applicant discovered making a misrepresentation before a consular official can avoid permanent ineligibility for a visa by admitting that he made a fraudulent claim.

Thus, the penalty for willful misrepresentation before a U.S. government official is often a slap on the wrist. Compare this with the penalty for a misrepresentation to, say, the IRS, and one begins to realize the distortion of U.S. immigration law as administered by the State Department. One should not be surprised that aliens ignore U.S. immigration law given that the agency responsible for administering those laws sends the message that a serious violation of the law will usually be reduced to a mere administrative obstacle. It is difficult to blame immigrants who cheat the system, as they are reacting to incentives placing bureaucratic process above legal principle.

Surely, this is not what Congress intended when writing immigration fraud laws. But it is the consular corps' standard in administering the law. In Mexico City, I saw how watered down the law could become. During

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a visit by the Assistant Secretary for Consular Affairs, visa officers were told that one could properly speak of fraud only if a misleading and untruthful application was made in the context of the smuggling of drugs, women, or children. Any other misleading and untruthful applications were to be refused temporarily under Section 214(b) of the INA, as regular and temporary ineligibilities. Thus, the head of all U.S. consular services articulated to junior officers a hollow standard for implementation of U.S. immigration law.

This allocation of priorities is also visible in the State Department's inadequate policing of malfeasance within its own ranks. I witnessed one particularly bad instance of internal misconduct in Mexico City; but perhaps the most publicized mishandling of fraud in recent years took place in Beijing, China, where a group of junior officers took the initiative to notify post management of a mid-level officer's involvement in visa-line corruption. It took a "small-scale mutiny" by the junior officers before the offending officer was dismissed from post. Astonishingly, he moved on to an attractive domestic assignment and even received a meritorious pay increase. (In contrast, three of the whistle-blowers resigned from the Foreign Service, citing as their motivation the State Department's mishandling of the investigation). The officer was ultimately terminated from the Foreign Service, but only after his activities in Beijing came to the attention of the Justice Department investigation of the Democratic campaign fund-raising scandal.[10]

Institutional Insulation

Two technical problems are also worth mentioning. First, as the State Department and INS databases are not connected, consular officers do not have access to INS information when performing background checks on applicants. This means that officers either issue visas without knowledge of past immigration difficulties or go through an arduous process of requesting information on applicants from INS. Second, INS communicates immigration violations at the border to the State Department in paper reports. During my tour in Mexico City, stacks of these notices piled up for more than one year before consular supervisors finally allocated resources to processing these notices into the State Department database. Until this process was completed, offenders whose visas were confiscated at the border could simply re-apply for—and receive—non-immigrant visas in Mexico City because the issuing consular officer was not aware of past violations. I understand that the backlog of notices has been cleared, and projects of electronic connectivity for INS to share its wealth of resources with consular officials are in the works. However, that the backlog persisted for at least a year, while hundreds of thousands of visas were issued, is another indication of the State Department's priorities.

During my tour in Mexico City, the non-immigrant visa section interviewed up to 2,000 applicants each day, 10,000 applicants each week, and almost half a million applicants each year—blindly. Indeed, in spite of several half-hearted efforts, the section never set up a systematic method for continuously measuring results or to determine if the standard refusal rate of around 30 percent provided a fair assessment of the situation. Thus, every year, large numbers of applicants were interviewed, and refusal rates were determined by intuition and bureaucratic sleight of hand, rather than by any objective assessment of how well the section was administering U.S. immigration law.

Conclusions

Immigration reform will naturally involve more than State Department reform, but I offer the following suggestions, as immediate measures:

Commission outside validation studies of immigration enforcement. An independent entity, other than the State Department, should monitor overstay rates and refusal rates for non-immigrant visas,[11] and monitor recent immigrants who become public charges in spite of the affidavit of support signed by their sponsor(s).

Evaluate consular management on overstay rates and enforcement of public charge laws. The State Department should consider overstay rates and use of public benefits by recent immigrants—rather than application rates—in assessing whether consular posts are fulfilling their mission statements and take these factors into account in the performance reviews of consular supervisors and officers.

Staff visa offices with personnel who actually want to work there. The administration of immigration laws is serious enough that it should not be handled by personnel with other aspirations, priorities, or professional interests. It should not be a hazing process.

Increase INS-State Department communication. Non-immigrant visa offices should have direct access to INS databases and information, and refusal sheets should be available electronically to avoid months-long waits for transportation and recording.[12]

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Ultimately, remove all immigration functions from the State Department. Assign these functions to an agency that does not face an inherent conflict between diplomacy and a responsibility to administer the law. Immigration officials overseas should be part of the same agency that handles immigration domestically. All should be sworn law enforcement officers.

Beyond these recommendations, there remain many issues to be resolved in the national debate over immigration enforcement (both legal and illegal). As this *Backgrounder* has indicated, the State Department's consular corps plays a crucial role in the administration of U.S. immigration laws. However, this role is often not known to the American public, as the debate tends to focus on INS.

Meaningful immigration reform cannot take place without a comprehensive review of the activities, priorities, and ethos of the State Department's consular corps, America's other Border Patrol. The consular corps may indeed face other problems and lack sufficient funding to meet the gargantuan and unrelenting visa demand worldwide—a perennial lament, which may have some merit, but often seems to be used as an excuse to hide managerial shortcomings and imprudent priorities. But the State Department, with its contradictory assignments of diplomacy and law enforcement mostly lacks the institutional interest to administer U.S. immigration laws conscientiously.

End Notes

1. Another consular responsibility, the provision of services to U.S. citizens abroad, is not the focus of this paper.

2. One notable exception to this rule involves the Visa Waiver Pilot Program, under which nationals of certain designated countries may seek entry into the U.S. as tourists without a visa under certain conditions.

3. Testimony of Michael D. Cronin, Acting Associate Commissioner, Programs, Immigration and Naturalization Service, Regarding Nonimmigrant Overstays, Before the House Judiciary Committee, Subcommittee on Immigration and Claims, p. 3. March 18, 1999.
http://www.house.gov/judiciary/106-cron.htm

4. "Feature Story: Consular Affairs Introduces 'Best Practices'," by Toni Markwitz. *State* Magazine, November 1999. http://www.state.gov/www/publications/statemag/statemag_nov99/feature8.html

5. "INS Releases Updated Estimates of U.S. Illegal Population." As of October 1996, the estimate was 54 percent. From INS website, http://www.ins.gov/graphics/publicaffairs/newsrels/illegal.htm

6. "Big Increase in Visas is Sought in Return for Border Control," by Jose de Cordoba and Joel Millman. *The Wall Street Journal*, p. A8, July 7, 2000.

7. "Affidavit of Support" Fact Sheet, Immigration and Naturalization Service, October 20, 1997. From the INS website, http://www.ins.gov/graphics/publicaffairs/factsheets/afffact.htm

8. http://www.cis.org/articles/poverty_study/index.html

9. "Immigrants' Growing Role in U.S. Poverty Cited," by Michael A. Fletcher. *The Washington Post*, p. A2. September 2, 1999.

10. "Clippings," *Los Angeles Times*. As quoted in the *Foreign Service Journal*, July 1999, p. 10. See http://www.house.gov/reform/oversight/hearings/99.07.29/index.htm for more details.

11. In order to pinpoint overstay rates, it would be helpful to establish exit records in addition to entry records at all U.S. ports of entry and egress. According to Associate Commissioner Cronin's testimony of March 18, 1999 (p. 4), "The Congress of the United States has instructed the Attorney General to develop an entry-exit control system for the land border. Section 110 of the Illegal Immigration Reform and Responsibility Act of 1996 set the parameters for such a system and Section 116 of the Omnibus Budget Bill, PL 105-277 extended the deadline for developing the system for land borders and seaports until March 30, 2001." This plan has apparently faced opposition from border state governors and other parties concerned with potential border backlogs. For effective immigration control, however, it is crucial that entry *and* exit controls be established for all ports-of-entry and egress to and from the United States, in order to determine the real extent of illegal overstays. Based on my personal travels, many countries in the world perform exit controls, without inconvenience to travelers.

12. I understand such projects have been conceived, but not yet implemented. Implementation of efficient, readily accessible data sharing between INS and the State Department ought to be a priority.

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By Nikolai Wenzel

This *Backgrounder* looks at some of the consequences of the State Department's administration of U.S. immigration law. One may agree or disagree with the tenor or details of current U.S. immigration law, but the validity and morality of the law are not at issue here. Rather, U.S. immigration laws are the law of the land. As such, the State Department is responsible for their proper administration.

The U.S. State Department's consular corps, with its authority to issue visas, plays such a crucial role in immigration that it can be considered America's other Border Patrol. As close to half of the illegal aliens residing in the United States hold non-immigrant visas issued by the State Department, a large part of the responsibility for uncontrolled immigration to the United States appears to rest with this department. Evidence also suggests a correlation between the State Department's immigrant visa issuance policies and the increasing levels of immigrant poverty in the United States. Given the institutional and bureaucratic traits of the Foreign Service, these statistics are not surprising. Indeed, entrusting the administration of laws to officials with diplomatic priorities is a recipe for trouble. It is difficult to imagine two governmental functions that are more incompatible than diplomacy and thorough administration of the law.